STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 96-31

CASE 96-C-0723 - Petition of AT&T Communications of New York, Inc. for Arbitration of an Interconnection Agreement with New York Telephone Company.

CASE 96-C-0724 - Petition of New York Telephone Company for Arbitration of an Interconnection Agreement with AT&T Communications of New York, Inc.

OPINION AND ORDER RESOLVING ARBITRATION ISSUES

Issued and Effective: November 29, 1996

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(Issued and Effective November 29, 1996)

BY THE COMMISSION:

INTRODUCTION

These are requests for arbitration of an interconnection agreement made pursuant to §252 of the Telecommunications Act of 1996 (the Act). AT&T Communications of New York, Inc. (AT&T) presented its request for negotiations under the Act to New York Telephone Company (New York Telephone) on March 1, 1996. Negotiations commenced, and the parties found that they were able to reach agreement on only some of the issues facing them. In conformity with the Act,[1] petitions for arbitration were filed August 8 and August 9 by AT&T and New York Telephone, respectively. The Act provides that "[t]he State commission shall . . . conclude the resolution of any unresolved issues not later than nine months after the date on which the local exchange carrier received the request [for negotiations]

[1] 47 U.S.C. §252(b)(1).

under this section."[1] Thus, the Act requires our decision on the matters in this arbitration by December 1, 1996.

Our obligations with respect to issues presented in arbitrations are spelled out in the Act. We are required to: (1) ensure that our resolution of issues and conditions imposed on the parties meet the requirements of §251 of the Act, and applicable regulations prescribed by the Federal Communications Commission (FCC); (2) establish rates for interconnection, services, or network elements in conformance with standards set forth in §252(d); and (3) provide a schedule for the implementation by the parties of our terms and conditions.[2] With respect to our procedures for addressing interconnection agreements and arbitrations, we issued on June 14, 1996 a notice of procedures for implementing §§251 and 252 of the Act.[3]

On August 8, the FCC released its First Report and Order (Order), which included detailed requirements for the implementation of §251 and interconnection agreements under the Act.[4] On October 15, 1996, the Eighth Circuit Court of Appeals stayed certain provisions of the Order, including its pricing provisions, pending appeal, and the subsequent appeal to the Supreme Court was denied.[5] Although AT&T and New York Telephone indicated in their petitions for arbitration that a number of

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[1] 47 U.S.C. §252(b)(4)(C).

[2] 47 U.S.C. §252(c).

[3] Cases 94-C-0095 et al., Transition to Competition in the Local exchange Market, Notice of Procedures for Implementing Sections 251 and 252 of the Telecommunications Act of 1996 (issued June 14, 1996).

[4] FCC First Report and Order, CC Docket 96-98, FCC 95-185, Implementation of Local Telecommunications Competition (issued August 8, 1996).

[5] Iowa Utilities Board et al. v. Federal Communication Commission, 1996 U.S. App. LEXIS 27953 (8th Cir., Iowa, October 15, 1996), app. den., 1996 U.S. LEXIS 6844 (Sup. Ct., November 12, 1996).

issues remained unresolved between them, they continued in following weeks to negotiate and to address the impact on their negotiations of the Order.

These petitions were assigned to Administrative Law Judge J. Michael Harrison in August, and in early September he directed the parties to provide lists of the issues resolved in negotiations, the issues remaining in dispute, and proposed arbitration procedures. Both parties responded to this direction with submissions dated September 13.

Meanwhile, requests had been received in late August from other telecommunications carriers, who were also in the process of negotiating interconnection agreements with New York Telephone, to intervene in this arbitration. Judge Harrison denied these requests, without prejudice.[1] Subsequently, MCI Telecommunications Corporation (MCI), one of the earlier movants, submitted its own petition for arbitration and renewed its motion[2] to intervene in this arbitration or, in the alternative, for a consolidation of its arbitration with this one. These requests were also denied by Judge Harrison.[3]

The parties convened in Albany before the judge and members of our staff, on September 19-20 and 24-25, for a series of conferences to clarify their September 13 filings, finalize an issues list, and determine procedures for the balance of the arbitration. It was determined that the arbitration would proceed on papers, with briefs on legal and associated policy issues to be filed by September 30 and October 8. Factual submissions were to be made by affidavit, and statements on

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[1] Cases 96-C-0723 and 96-C-0724, Ruling on Petitions to Intervene (issued September 4, 1996).

[2] MCI letter dated September 19, 1996.

[3] Cases 96-C-0723 and 96-C-0724, Ruling on request to Intervene and Request to Consolidate Arbitrations (issued September 30, 1996).

factual and associated policy issues were to be filed on October 8 and October 15. Both parties made the contemplated filings. After the Eighth Circuit issued the stay, Judge Harrison then requested the parties to file an analysis of its effect on their positions or proposals in this arbitration, and both parties responded in filings dated October 23. In a letter to the parties dated October 24, the judge denied New York Telephone's request to submit supplemental rate proposals.

The issues stipulated by the parties for arbitration were then analyzed on the basis of the record developed and comments submitted, and presented to us for a final determination. The issues are divided among four categories, as discussed below: resale, elements and combinations, collocation, and miscellaneous.

RESALE

Applicability of the 915 Tariff

1. Requirements of the Act

New York Telephone's 915 tariff, effective on a temporary basis on October 8, 1996, provides in extensive detail the terms and conditions for resale of its retail services. This tariff was filed pursuant to an order issued June 25, 1996.[1] AT&T has submitted to arbitration a list of issues involving terms and conditions for resale, a few of which are not addressed in the 915 tariff, but most of which would alter the terms provided in the tariff. AT&T requests adoption of its position on these issues.

AT&T proposes a stand-alone contract with the arbitrated terms and conditions for resale incorporated as contract terms. According to AT&T, if the tariff is reflected in

[1] Cases 94-C-0095 et al., Regulatory Framework for the Transition to Competition in the Local Exchange Market, Order Declaring Resale Prohibitions Void and Establishing Tariff Terms (issued June 25, 1996).

the agreement, the tariff should be amended to prohibit changes to it without AT&T's consent, and to include a waiver by New York Telephone of the right to initiate changes that would materially and adversely affect the rights of interconnection agreement signatories.

In response, New York Telephone argues that the 915 tariff should be incorporated in the agreement by reference, and that the agreement should be deemed to be modified by any future changes the Commission permits to be made in the tariff. Nothing in the Act, according to New York Telephone, overturns our decision in the June 25 Order that the terms and conditions of resale should be offered pursuant to tariff.

AT&T acknowledges that the 915 tariff does not violate the Act; in fashioning an interconnection agreement between it and New York Telephone under the Act, however, AT&T asserts that it is not bound by the terms of the 915 tariff and is entitled to have other proposed terms arbitrated. AT&T points out that incumbent local exchange carriers (incumbent LECs) under the Act have a duty to negotiate interconnection agreements in good faith[1], and that any filed statement of "generally available terms" under §252(f) of the Act does not "relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251."[2] AT&T also suggests that, because the Act requires a state commission in an arbitration to "resolve each issue" presented by the parties,[3] we are required to consider alternatives presented to the provisions in New York Telephone's 915 tariff.

In response to these arguments, New York Telephone concedes that individually negotiated and arbitrated agreements

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[1] 47 U.S.C. §251(c)(1).

[2] 47 U.S.C. §252(f)(5).

[3] 47 U.S.C. §252(b)(4)(C).

are contemplated by the Act, but argues that AT&T's reference to the Act's provisions concerning its duty to negotiate is beside the point, now that it is in an arbitration with AT&T. New York Telephone argues that we may allow it to apply the terms of its 915 tariff to its interconnection agreement with AT&T. The requirements of the Act were considered, New York Telephone adds, in the development of the tariff.

New York Telephone asserts, moreover, that the terms of the 915 tariff should apply generally to all carriers entering into interconnection agreements. Pointing out that the Act provides that all local exchange carriers (LECs) and incumbent LECs are generally required "not to impose unreasonable or discriminatory conditions or limitations on" resale,[1] New York Telephone argues that offering service for resale on a generic basis through the 915 tariff accomplishes that objective.

In response to that argument, AT&T asserts that reference to the various provisions requiring non-discriminatory conditions for resale is beside the point, because the Act also provides that New York Telephone must make available to all other carriers any of the terms or agreements for resale included in its agreement with AT&T.

Its interconnection agreement should not be made conditional or reliant on the 915 tariff in any way, AT&T continues, for reasons relating to the difference between its rights under contract law and its rights as a subscriber under the terms of a tariff. For one thing, AT&T argues, changes could be made to the tariff pursuant to the Commission's normal tariff revision process, under which it has a right to comment but no more, whereas the terms and conditions in a contract could not be changed without its consent. For another, AT&T asserts, there is no liability of New York Telephone to AT&T for breach of a tariff

[1] 47 U.S.C. §§251(b)(1) and 251(c)(4)(B).

term, except for gross negligence or willful misconduct,[1] while it has a right to enforce contract terms. Finally, AT&T avers that its right to appeal our decision on resale terms and conditions in an AT&T interconnection agreement, as being inconsistent with Act §§251 or 252, will be limited to our determination in this arbitration, and will not be available to contest a future change in the 915 tariff.

New York Telephone is correct that the duty of incumbent LECs to negotiate does not compel the conclusion that the 915 tariff terms cannot be considered. Similarly, AT&T is correct that the non-discrimination requirements of the Act do not compel the conclusion that those terms must be used. The issue relates to the conditions under which the terms and conditions for resale effective under the agreement should be permitted to change in the future. Any terms or conditions for resale in AT&T's interconnection agreement that were reached through agreement with New York Telephone, once approved, could not be changed without the mutual consent of the parties. In prescribing an arbitrated result, however, nothing in the Act prohibits us from instituting a tariff process, or adopting the previously instituted 915 tariff process, as a term to be included in the agreement.

Such a result is appropriate because it preserves our flexibility to make modifications--consistent with the Act and with the public interest--that may appear desirable or necessary as experience with resale is gained. Setting one set of terms in stone for AT&T would appear to be a less desirable approach and, while the Act permits such an approach, it does not require it.[2]

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[1] Public Service Law §93.

[2] Notably, two interconnection agreements we have approved have incorporated the terms and conditions of the 915 tariff, and provided that the agreements must be changed to reflect future changes in the tariff. Case 96-C-0655, New York Telephone

2. AT&T's Proposals

AT&T was requested to provide proposed terms to consider in place of specific terms in the 915 tariff that it opposes. In response, AT&T provided a list of concerns about the tariff.[1] Although AT&T proposed alternatives for some provisions, the issues remain generally undeveloped by the parties.

We conclude that AT&T has raised some potentially legitimate concerns that need to be considered, but that the 915 tariff review process is the best avenue for addressing AT&T's concerns. Some of AT&T's concerns have already been addressed in an ongoing proceeding.[2] There are other issues, however, such as reseller indemnification of New York Telephone, liability for

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Company and United Telemanagement Services, Inc., Order Approving Interconnection Agreement (issued October 3, 1996); Case 96-C-0656, New York Telephone Company and Frontier Communications International, Inc., Order Approving Interconnection Agreement (issued October 3, 1996).

[1] AT&T's Initial Brief on Law and Policy Issues, Attachment 1.

[2] We recently directed New York Telephone to make revisions to its 915 tariff which address some of AT&T's concerns. Case 95-C-0657, Order Directing Tariff Revisions (issued November 21, 1996). Sections 6.17.4(B) and (C) of the tariff, which would have allowed New York Telephone to cancel a reseller's service without notice in certain circumstances, is being revised to provide for thirty days notice to the reseller and the Commission. Section 7.10.1(B), which according to AT&T contained overly broad exceptions to the confidential treatment of information provided by AT&T, is being revised to further limit those exceptions. Section 7.13, which would have allowed New York Telephone to cooperate with law enforcement officials without giving notice to resellers, is being changed to give such notice to resellers. Section 7.14, which would have allowed New York Telephone to change telephone numbers as it deemed necessary, is being revised to include a requirement that such changes be non-discriminatory to resellers. And §7.15 is being revised to allow New York Telephone to accept Primary Interexchange Carrier (PIC) change orders only from the reseller, as suggested by AT&T.

end-user violations, default carrier selection upon service discontinuance by a reseller, and the responsibility to monitor the accuracy of New York Telephone's bills, that require further thorough consideration. Thus, we will review such issues through the tariff review process.

Notice of New or Modified Retail Services

One issue involving the 915 tariff has been presented by the parties for resolution here. The parties seek determination of the degree of advance notice to be provided to resellers before New York Telephone files a tariff proposing new or modified services.

AT&T argues that for effective, fair competition, it must be provided a description of any material changes that would affect ordering, provisioning, repair and billing systems, and/or operations, and such notice must be provided sufficiently in advance of the effectiveness of New York Telephone's offering to prevent any degradation of service to existing customers and to permit AT&T a fair chance to offer its own competitive services in a timely manner.

New York Telephone argues that the current provisions of the 915 tariff are adequate. The tariff now provides that such advance notice will be given only to the extent required by the Public Service Law, the State Administrative Procedure Act, Public Service Commission orders and regulations, and other applicable law. In effect, that argument means that the notice required for implementing a new tariff is all that should be afforded in the resale environment.[1]

[1] Depending on the type of service involved, New York Telephone observes, the notice period may be ten, thirty, or seventy-five days.

AT&T responds, however, that the time needed to "operationalize" a new service offering might well exceed the statutory and legal periods for noticing tariff changes. AT&T notes that the Act specifically requires incumbent LECs to provide "reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities and networks, as well as of any other changes that would affect the interoperability of those facilities and networks."[1] According to AT&T, 90 days should be the minimum notice period, but the period can differ depending upon how much time New York Telephone itself needs to prepare for the change.

In response, New York Telephone points out that AT&T has "failed to identify or describe a single concrete example" of interoperability changes it would have to make to resell a new or modified New York Telephone service.[2] The concern, New York Telephone continues, is purely speculative, and should be addressed only if it becomes an issue.

The Act does not require the kind of broad advance notice of each and every new or modified service offering that AT&T requests, and we do not find the request to be a reasonable one. In a competitive marketplace, firms are entitled to develop new services and prepare for marketing them without disclosure to competitors. Indeed, this is proprietary information. In this instance, New York Telephone should have the same rights in that respect that AT&T, as a reseller, has.[3]

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[1] 47 U.S.C. §251(c)(5).

[2] New York Telephone's Initial Brief on Law and Policy, p. 41.

[3] The conclusion is consistent with our recent precedent, Cases 94-C-0095 et al., Regulatory Framework for the Transition to Competition in the Local Exchange Market, Order Declaring Resale Prohibitions Void and Establishing Tariff Terms (issued June 25, 1996) (the June 25 Order).

The Act requires adequate notice of changes affecting interoperability, or the ability to receive and resell wholesale services, but this is a far narrower concern. New York Telephone implies, correctly in our view, that such concerns will not arise every time it contemplates a new service offering. AT&T's broad request is denied; however, where interoperability is affected by changes, we conclude that New York Telephone must give AT&T 90 days notice.

1. Large Volume Discounts and Centrex Listings

Two features of New York Telephone's retail tariffs are specifically claimed by AT&T to be unreasonable restrictions on resale. AT&T asks that these provisions be declared void as to its wholesale purchases. One provision is a volume discount plan offered by New York Telephone only to business customers, in exchange for a time and usage revenue commitment. A tariff provision precludes business customers from satisfying the revenue commitment with usage from residential lines. AT&T argues that such a condition is an unreasonable restriction on resale; New York Telephone responds that it is not a restriction on resale. The second condition is the provision of one free directory listing per Centrex System. AT&T argues that it should be entitled to free listings for each of its customers, when it purchases one Centrex system with many lines but resells it among a number of end-use customers, an approach it intends to follow. NYT disagrees, arguing again that the listing condition is not a restriction on resale.

> The Act provides that incumbent LECs have:
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> the duty . . . not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State Commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available

> at retail only to a category of subscribers from offering such service to a different category of subscribers.[1]

The FCC has reached the following conclusions in this regard:

> We conclude that resale restrictions are presumptively unreasonable. Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored. Such resale restrictions are not limited to those found in the resale agreement. They include conditions and limitations contained in the incumbent LEC's underlying tariff. As we explained in the NPRM, the ability of incumbent LECs to impose resale restrictions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position.[2]

1. Large Volume Discount Plans (LVDPs)

AT&T argues that the condition excluding residential lines from the usage revenue commitment is an unreasonable restriction on resale because: (1) the FCC has found it presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume minimum usage requirements,[3] and (2) the FCC has also declared cross-class selling restriction to be presumptively unreasonable.[4] In the case of both volume discount offerings and cross-class restrictions, the FCC said that "we will allow incumbent LECs to rebut this presumption by proving to the State commission that the . . . restriction is reasonable and nondiscriminatory."[5]

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[1] 47 U.S.C. §251(c)(4)(B).

[2] Order, ¶ 939.

[3] Order, ¶ 953.

[4] Order, ¶ 964.

[5] Id.

AT&T argues that it may resell New York Telephone's business offerings to residential customers; accordingly, the aggregation restrictions may not prohibit AT&T from aggregating usage of its end users, including residential end users, to meet the volume commitments of the volume discount plans.

In response, New York Telephone argues that the aggregation provision is not a restriction on resale and is, in any event, narrowly tailored. According to New York Telephone:

> The retail tariff provision precluding residential usage from inclusion in the LVDP is not an unreasonable restriction on resale, but simply a reasonable term and condition of the resale service itself. AT&T, as the customer of record, will be allowed to aggregate usage of its customers to the same extent as any other customer of NYT would be allowed to aggregate usage.[1]

In constructing the business usage plan, New York Telephone continues, it looked at usage patterns and characteristics unique to business customers, and offered volume based discounts accordingly; allowing AT&T to include residential usage would, therefore, undermine the LVPD. Further, to allow AT&T to include the residential usage of its customers when New York Telephone's customers cannot, New York Telephone asserts, would favor resellers and discriminate against its retail customers.

To begin, the usage aggregation restriction is not a term that requires AT&T's customers to meet aggregate usage conditions. New York Telephone concedes that, as a reseller, AT&T will be able to qualify for the LVDP by aggregating the usage of all of its customers. Thus, the limitation on inclusion of residential lines, which applies both to New York Telephone's and AT&T's end users, does not operate as a restriction on end user aggregation in that way and cannot be found unreasonable in that respect. Indeed, the ability to aggregate the usage of end

[1] New York Telephone's Initial Brief on Law and Policy, p. 28.

users would appear to give AT&T a considerable advantage, making the volume discount potentially available to customers whose individual usage would not qualify them for the LVDP as New York Telephone customers.

Nor is the aggregation restriction a limitation of AT&T's right to resell services across class boundaries, and specifically its right to sell business services to residential customers. The issue has not been presented of reselling business services to residential customers--the residential lines involved here are lines sold under residential service offerings--and, accordingly, their inclusion in the aggregation is not permitted.

Nor is the restriction presumptively unreasonable under either of the two general FCC proscriptions identified by AT&T. Here, rather, the issue is whether, when business services are resold to business customers, the businesses can add the residential line usage of their employees in order to meet the volume discount. NYT argues persuasively that AT&T's business customers should not be permitted to do this when its own business customers cannot. NYT is correct that this is not a restriction on resale, but rather a retail restriction.

Nothing in the Order leads to a contrary result. Thus, this is not a situation where "conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition,"[1] and in any event, the FCC has said that such issues, involving "rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions . . . ."[2] This condition is a reasonable one, and will be left in place.

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[1] Order, ¶ 952.

[2] Ibid.

2. Centrex Directory Listings

Here, the issue is whether AT&T should be entitled to free listings for each of the customers to which it resells Centrex from a single Centrex service it has purchased. New York Telephone provides one free directory listing per customer, or billed telephone number (BTN). Likewise, the company will similarly provide free listings for end use customers of resellers.

New York Telephone provides one free listing per Centrex customer, regardless of the number of lines purchased as part of the Centrex service. Additional listings may be purchased, at a customer's discretion. Similarly, AT&T may order a single Centrex service with any selected number of lines, from 5 lines up to several thousand, as may a retail customer, but as a reseller AT&T can purchase the selected Centrex system at the wholesale discount. Similarly, AT&T may purchase additional listings, at the wholesale discount.

AT&T argues that its end-use customers should each be entitled to one free listing. Thus, if AT&T purchases a 1,000 line Centrex and sells 10-line Centrex to 100 customers, it should be entitled to 100 free listings. AT&T argues that it should not be constrained by New York Telephone's retail tariff provision from providing to each of its end user customers a single, free listing under the same conditions that NYT offers to its end user Centrex customers.

As in the case of the LVDPs, New York Telephone takes the position that the Centrex tariff term limiting to one the number of free directory listings per Centrex customer is not a restriction on resale, much less an unreasonable one. Centrex service, New York Telephone points out, combines a local exchange line with multiple features such as call forwarding, conference calling, intercom, and pickup. Customers are charged for Centrex on a per line basis, but when more lines are purchased the price per line, as a general rule, declines. This is due not only to

economies of scale, but also to the fact that only one directory listing is included regardless of the number of lines.

Given the structure of the service, it seems obvious that AT&T should not be entitled to a free listing for each of its customers when it purchases "one" Centrex of several thousand lines and resell it to dozens or hundreds of customers. Rather than creating a "level playing field," as AT&T asserts,[1] this would provide AT&T with a significant advantage above and beyond the wholesale discount.

Such a result is not required, for as New York Telephone points out, the directory listing term of its Centrex tariff is not a restriction on resale. AT&T is not constrained, in fact, from providing listings to its end user customers at whatever terms it feels are appropriate. However, it must purchase any additional listings from New York Telephone at the wholesale discount price.

Unbundling of Operator and Directory Assistance (O&DA)

1. The Unbundling Requirement

In our June 25 Order, we directed New York Telephone to file a total service (bundled) resale tariff on July 1, 1996, as "an adequate first step to resale of New York Telephone local exchange services,"[2] but ordered the company to comply with certain unbundling requests by October 1, 1996, including the unbundled provision of "branded directory assistance/operator services." Noting that it petitioned for rehearing of the June 25 Order with respect to unbundling of O&DA in a resale environment, and that we had yet to act on that petition, New York Telephone argues that the issue posed for the arbitration is whether the Act requires the unbundling of O&DA and the associated provision of customized routing capability. New York

[1] AT&T's Reply Brief on Law and Policy Issues, p. 21.

[2] Cases 94-C-0095 et al., supra, June 25 Order, p. 7.

Telephone argues that it does not, citing various sections of the Act and the Order, all indicating that it is not required to provide for resale services that it does not provide at retail.[1] Thus, unless it were to offer local exchange services without O&DA support to retail customers, New York Telephone argues, it is not required by the Act to offer such services at wholesale rates.

AT&T argues, however, that New York Telephone has not challenged the lawfulness of the June 25 Order, and instead has merely argued technical infeasibility; thus, AT&T says, its "argument here that it is not obligated as a matter of law to offer basic exchange service without O&DA is barred."[2] In addition, AT&T argues, the FCC has also ruled that basic exchange services offered for resale must be unbundled from O&DA services.[3] Further, AT&T argues, to continue to require resellers to purchase New York Telephone's O&DA services along with the basic exchange services they wish to resell would constitute a classic "tying" arrangement under the antitrust laws, and would stifle competition in both the local exchange and O&DA marketplaces.

In response, New York Telephone argues that carriers will be able to purchase local exchange services without O&DA by purchasing elements, and that offering them unbundled local

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[1] E.g., Order, ¶¶ 872 and 877.

[2] AT&T's Initial Brief on Law and Policy, p. 21.

[3] AT&T points to the FCC's statement that: "We therefore find that incumbent LECs must unbundle the facilities and functionalities providing operator services and directory assistance from resold services and other unbundled network elements to the extent technically feasible" (Order, ¶ 536). This statement, AT&T continues, was backed by an FCC requirement that the computation of avoided costs used in setting the wholesale rate reflect the removal of O&DA costs (Order, ¶ 917).

exchange services at a discount for resale would be unfair and would put excessive strain on its switching capacity.

We have ordered the unbundling of the facilities and functionalities providing operator service and directory assistance from resold services.[1] In doing so we are, consistent with the Act, exercising our authority to determine the retail services New York Telephone must provide.

2. Operator Branding

New York Telephone states that it will provide O&DA services, as an element, by January 1, 1997. However, it will not be able to provide customized routing and rebranding capability in the resale environment,[2] New York Telephone states, until January 1, 1998. The amount of time needed for the necessary system changes, discussed below, is in dispute. Given that additional time is needed, however, AT&T raises the issue of the proper interim approach to branding.

There is no dispute that New York Telephone is required to provide ultimately a rebranding solution that offers carrier branding on request. We recently concluded that "failure by an incumbent LEC to comply with reseller branding requests presumptively constitutes an unreasonable restriction on resale."[3] As AT&T points out, the FCC has also determined that

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[1] Cases 94-C-0095 et al., Order Denying Reconsideration and Referring Issues to Arbitration Proceedings (issued November 18, 1996), mimeo, p. 7.

[2] The technical network change that will permit rerouting of an O&DA call to a competitor's platform is the same change that will permit identification of a caller by carrier and, hence, rebranding of the operator service by the operator to identify the caller's carrier.

[3] Cases 94-C-0095 et al., supra, Order Denying Reconsideration and Referring Issues to Arbitration Proceedings, p. 9.

brand identification is likely to play an important competitive role in the resale environment,[1] and has ordered rebranding.

AT&T asserts that, meanwhile, until New York Telephone completes the required rebranding and customized routing, it should be required to unbrand its calls (i.e., provide operator service with the response "operator" made to all calls).[2] New York Telephone states that it can unbrand fairly quickly, but it asserts that it is not required by the Act and should not be required to do so. New York Telephone states that it could develop the capability for a partial unbranding (in which all calls placed to O&DA services by its customers are responded to by the operator saying "NYNEX" and all calls placed by competitors' customers are responded to by saying "operator") by June 1, 1997, and it apparently offers to provide this "interim solution" at that time.

AT&T argues that there will be confusion when an AT&T local customer places an O&DA call and hears "NYNEX" or no name at all. Although inferior to branding, full unbranding is technically feasible now and, AT&T asserts, is preferable to either the status quo or New York Telephone's proposed interim solution. Moreover, AT&T asserts, unless unbranding is ordered, New York Telephone will have no incentive to complete the customized rerouting and rebranding capability.

New York Telephone responds that nothing in the Act or the Order requires it to unbrand its own O&DA services, and it goes on to argue in its reply brief that unbranding, pending rebranding, would put it at a disadvantage vis-a-vis AT&T, which can continue to associate its name in connection with operator services for toll calls. Moreover, New York Telephone continues,

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[1] Order, ¶ 971.

[2] New York Telephone plans to phase out the 611 repair service by January 1, 1997, so interim unbranding of 611 calls is not an issue here.

alternative operator services (AOS) employed by hotels or payphones often charge more than NYNEX operator services, and so it serves the public interest that NYNEX operators continue to be branded. Finally, New York Telephone asserts, standards developed under the Federal Telephone Operator Consumer Services Improvement Act (TOSCIA) require written and audio identification requirements for operator service provided to publicly accessible telephones, and unbranding runs counter to the TOSCIA requirements.

Although we are concerned that New York Telephone complete the capability for customized routing and rebranding of O&DA calls as soon as possible, interim unbranding of all O&DA calls does not appear desirable. However, we do find that, as an interim measure, New York Telephone should implement unbranding of calls placed by AT&T resale customers to New York Telephone O&DA services concurrent with the effective date of its interconnection agreement with AT&T. New York Telephone's partial unbranding proposal will accomplish this.

3. Technical Feasibility

We must determine, as a condition in this arbitration, when unbundled local exchange services and customized routing must be provided to AT&T. According to New York Telephone, there are two available approaches to providing customized routing and rebranding: (1) a class of service (COS) approach, whereby the required routing logic is built into every end office; or (2) an Advanced Intelligent Network (AIN) approach, where the routing logic is stored in a central location.

New York Telephone states that it can provide rerouting using a COS approach by early 1997, and provide for reseller unbranding in about 6 months.[1] However, New York Telephone

[1] As noted earlier, New York Telephone has offered partial unbranding of O&DA calls by June 1, 1997. Full unbranding of O&DA calls can of course be implemented much sooner; according